IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1607 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LILAVATIBEN PARSHOTTAM THAKKER

Versus

SHRI SOLANKI BUDHALAL AMRATLAL

Appearance:

MR DD VYAS for Petitioners

MR BJ JADEJA for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /12/2000

C.A.V. JUDGEMENT

#. This is landlord's revision under sec.29(2) of the Bombay Rent Act.

#. The brief facts giving rise to this revision are that, the revisionists, landlords filed a suit for

eviction of the defendant, respondent alleging that the defendant was tenant of residential premises on monthly rent of Rs.30=00. He did not pay rent from 26-12-1981 to 27-9-1982. Thus, nine months rent fell due from the tenant, whereupon notice of demand and termination of tenancy was served on him. Notice remained uncomplied with. Neither arrears were paid nor the premises was vacated. It was also alleged that the suit premises was let out for residential purpose but, the defendant used it for manufacturing and repairing of sofa. It was also alleged that the defendant installed electric motor for business purposes, which created noise and pollution. Thus, decree for eviction was sought also on the ground of change of user, nuisance & annoyance.

#. The tenant, respondent contested the suit denying all these allegations. He also raised dispute of standard rent in the written statement. According to him, the standard rent should be Rs.23=00 per month and not Rs.30=00 per month. The allegation of change of user, nuisance, etc. was denied. It was also pleaded that he was ready and willing to pay the rent, hence, decree for eviction could not be passed.

#. The trial Court found that the tenant, respondent was in arrears of rent exceeding six months (i.e. nine months) and he failed to pay the same within a month of service of notice of demand. It was found by the trial Court that the case is covered by sec.12(3)(a) of the Bombay Rent Act, and as such, decree for eviction was passed eventhough the landlords' allegation of nuisance and change of user was not upheld by the trial Court.

#. Feeling aggrieved, the tenant preferred an appeal, which was allowed and the lower appellate Court found that the view taken by the trial Court was errorneous and the case did not fall under sec.12(3)(a) of the Act. Accordingly, decree for eviction was reversed by the lower appellate Court. Hence, this revision by the landlords.

#. I have heard Shri UM Panchal, representing the revisionists and Shri BJ Jadeja for the respondent, tenant.

#. The only point for consideration in this revision is, whether the view taken by the lower appellate Court is in accordance with law, that the case is not covered by sec.12(3)(a) of the Act and that, it is covered by sec.12(3)(b) of the Act.

#. Section-12(3)(a) can be applied when the following ingredients are established by the landlords :-

1. That the rent is payable monthly;
2. There is no dispute regarding the amount of standard rent or permitted increase;
3. The tenant neglects to make payment thereof until the expiration of period of one month after notice under sec.12(2);
4. That the tenant is in arrears of rent for a period exceeding six months.

#. So far as the last contention is concerned, there is concluded finding of fact recorded by the two courts below that, when the notice was served, the tenant was in arrears of rent for a period exceeding six months, namely, nine months. The trial Court has referred two counterfoils of rent receipt book bearing signature of the tenant, and upon other evidence and the counterfoils of rent receipt book, it was concluded that the rent exceeding six months was due from the tenant. Thus, this condition is established in the instant case.

##. It is also established that the rent exceeding six months was not paid by the tenant, respondent within a month of service of notice of demand. Consequently, this condition is also established.

##. Coming to the next condition that, there was no dispute of standard rent, Shri Jadeja, learned counsel for the respondent contended that, there was dispute of standard rent and the defendant pleaded that the standard rent should be Rs.23=00 per month and this dispute was not decided earlier but, was decided while delivering the judgment by the trial Court. As such, according to him, since there was dispute of standard rent, sec.12(3)(a) can not be applied. It is, however, difficult to accept this contention for the reason that the dispute of standard rent was not raised within a month of service of notice of demand. Admittedly, notice of demand was not replied by the tenant. The dispute of standard rent was raised by the first time in the written statement, which was not filed within a month of service of notice of demand, nor it could be filed within a month of service of notice of demand because, the suit itself could be filed only after expiry of one month of service of notice of demand. There are several ways of raising the dispute of standard rent. It may be raised by the tenant prior to the service of notice of demand. In that case, he has to move an application for fixation of standard rent under sec.11 of the Act. It is not the case of the

tenant that he moved any application for fixation of standard rent. The other mode of raising such dispute is to give a reply to the notice of demand raising the dispute of standard rent within a month of service of notice of demand. This was also not done. Another mode of raising such dispute can be by moving an application under sec.11 of the Act for fixation of standard rent within a month of service of notice of demand. This was also not done. Consequently, raising of dispute of standard rent after the statutory period, namely, one month of service of notice of demand, can not be considered to be a dispute of standard rent within the meaning of sec.12(3)(a) of the Act. Thus, there was no dispute of standard rent and this condition is also established by the landlords.

##. The last condition to be established is that the tenancy was monthly. On this point, parties are not in agreement. According to Shri Panchal, it was monthly tenancy, whereas according to Shri Jadeja, it was not monthly tenancy because, taxes were included in the rent and taxes are not payable monthly, hence, the tenancy can not be said to be monthly. Shri Jadeja has relied upon the judgments referred by the lower appellate court in its judgment, in support of his contention. It may, however, be mentioned that those cases are of no help to the respondent for the obvious reason that, in the plaint it was specifically alleged that Rs.30=00 per month includes taxes. It was also not specified either in the plaint or in the notice that, what is the amount of taxes and what is the nature of taxes. The lower appellate court considered that, there was vague assertion by the landlords that taxes were payable by the tenant. Shri Jadeja, however, contended that Rs.30=00 per month includes education cess, as well as taxes, and in view of this, it can not be said that the rent was payable monthly. However, this controversy was settled in MANILAL ABHAJI v. SWAMI VAISHVACHARYA GURA 2000(2) GLR 1191, where this Court placing reliance upon the Supreme Court's verdict in RAJU KAKARA SHETTY v. RAMESH PRATAPRAO SHIROLE 1991(1) S.C.C. 560 held that, 'where education cess is payable by the tenant in addition to the standard rent under the rent agreement, though education cess is payable by the landlord annually, parties by agreement can quantify the amount of cess to be paid on month to month basis by the tenant (provided the amount does not exceed the tax liability of the landlord). The right to enter into such an agreement has also been upheld by observing that the statutory right to recover the tax amount by way of reimbursement can be waived or limited by the holder of such right or the

recovery can be regulated in a manner mutually arranged or agreed upon by the concerned parties so long as it is not in violation of the Statute.' It was further observed that, 'it is not correct to say that even in cases where the entire tax liability is on the landlord and the tenant had to pay a gross rent, the mere recital in the lease that the rent is inclusive of taxes takes the case outside the purview of sec.12(3)(a) of the Act.' The basic principle is that, parties can agree to quantify such a monthly component and it is open to the parties to include the same in the monthly rent payable, and if that is so, the mere fact that the rent payable on monthly basis includes of tax component would not take the case out of operation of sec.12(3)(a) of the Act. In face of this observation, there remains little scope for accepting the contention of Shri Jadeja.

##. Shri Jadeja has contended that the lower appellate Court has recorded finding on this aspect after considering the evidence on record, hence, it can not be disturbed or interfered in revision. I again find no force in this contention. The finding is contrary to law, which has been enunciated in the foregoing portion of this judgment. Even if, Rs.30=00 per month included education cess or other taxes, the case will not go out of ambit of sec.12(3)(a) as has been held by the Apex Court and by this Court in two cases referred earlier.

##. In the last, Shri Jadeja contended that there is no rent note or any written agreement indicating that Rs.30=00 per month included education cess and taxes. However, when rent is inclusive of taxes, there remains little scope for contention that there was no agreement for charging rent inclusive of taxes.

##. For the reasons given above, I do not find any merit in the objections and contentions of Shri Jadeja. The lower appellate Court was patently in error in reversing the decree of the trial Court and misconstruing the provision of sec.12(3)(a). Since the judgment of the lower appellate Court is not in accordance with law, interference in revision is permissible.

##. The revision, therefore, succeeds and is allowed. The judgment and decree of the lower appellate Court is hereby set-aside and that of the trial Court is restored. No order as to costs.

Dated : /12/2000. [D.C. Srivastava, J.]

/sakkaf